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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

MICHAEL KLINE,

Petitioner,

v.

HONORABLE ROBERT BUDOFF
and DENA KLINE,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Arizona

PETITION FOR WRIT OF CERTIORARI

C. ROBERT COLLINS
Counsel of Record
COLLINS & COLLINS, L.L.P.
10801 NORTH 32nd STREET, SUITE 3
PHOENIX, AZ 85028
(602) 788-7227

Counsel for Petitioner

July 12, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

A. Does it violate federal immigration law and the pubic policy of the United States for a State to assume jurisdiction for the purposes of child custody, divorce, division of assets in foreign countries, child support, alimony, etc. when the foreign national is in this country by a **temporary visa** when assumption of jurisdiction is contrary to federal law as set forth in *Guadin v. Remis, 415 F.3d 1028, (Ninth Circuit 2005)*. ["Temporary immigration status prevented a person from establishing domicile in the United States."] Arizona law requires that a person be "domiciled" or permanently reside in Arizona before the state court has subject matter jurisdiction of divorce issues.

B. Does it offend traditional notions of justice and fair play to exercise personal jurisdiction over a father on the bases of service of process within the State of Arizona when the father obtained admittance into Arizona and the United States to retrieve his children who had been kidnaped from their home in Mexico and hidden in Arizona by their mother. (The children are Mexican citizens by birth and Canadian citizens because of their parents' birth.)

C. Does it violate the Hague Convention for the Courts of the State of Arizona to ignore demands by the State Department and the Country of Mexico for the return of its citizens (children) so that the Courts of Mexico can determine their best interests, determine custody and determine other issues related to divorce when Mexico had already issued custody and access orders prior to Arizona assuming jurisdiction.

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner is a citizen of Canada who had resided and worked in Mexico for many years. He owned a vacation home in the State of Arizona, but his ability to enter the United States is limited and controlled by Homeland Security because of a prior felony conviction in the United States.

Respondent

Respondent is a State Court judge who assumed jurisdiction and ignored Mexican Court orders and a demand for the return of the children to Mexico.

The second Respondent or the real party in interest is the mother of the children involved and is a Canada citizen who also resided in Mexico for many years, but who visited Arizona on a visitor's visa and/or a temporary visa to attend college and while visiting filed for divorce. Her first attempt to divorce was dismiss when she could not enter the United States from Canada because of the denial of a visa by Homeland Security.

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OPINION BELOW

The unpublished opinion of the Arizona Court of Appeals for Division One at Phoenix, Arizona, was filed with the Clerk of the Court on October 3, 2006. A copy of the Arizona Court of Appeals opinion is included in the Appendix at 3a through 12a. A Petition for Review to the Arizona Supreme Court was filed and the Arizona Supreme Court denied review by order dated April 18, 2007. The order of denial by the Arizona Supreme Court is found in the Appendix at 1a.

JURISDICTION

The Arizona Supreme Court denied the Petition for Review of the decision of the Arizona Court of Appeals on April 18, 2007. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Review by the Arizona Supreme Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

A. U.S. Constitution, Article VI, Clause 2

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

B. U.S. Constitution, Amendment XIV

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

C. Hague Convention - 42 U.S.C. §11603

(a) Jurisdiction of courts: The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions: Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice: Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case : The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof: (1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence— (A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and (B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights. (2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing— (A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and (B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention: For purposes of any action brought under this chapter— (1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies; (2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and (3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit: Full faith and credit shall be accorded by the courts of the States and the courts of

the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive: The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

STATEMENT OF THE CASE

This petition results from a state trial court's assertion of jurisdiction over a Canadian Husband and Father (hereafter "Father"), residing permanently in Mexico, based on service at a hotel when he went to Arizona to attempt to retrieve his children after they had been kidnaped by force from Mexico by the Real Party In Interest, their Canadian Mother and a Mexican resident (hereafter "Mother"), and brought to the United States in violation of a Mexican custody order. (State Appendix C)

The Mexican Department of the Exterior requested the return of the children to Mexico under the Hague Convention. The Department of State requested the Respondent Judge for a stay under Article 16 of the Hague Convention. The Respondent Judge declined to act on the request and denied a similar request from the Mexican Consulate.

CONFLICTING JURISDICTIONAL ORDERS

The Respondent Judge issued three (3) orders on jurisdiction. (State Appeal Appendix 6, 11, 14). There are a total of five (5) orders on jurisdiction, three (3) of which contradict. (State Appeal Appendix 1, 2, 6, 11, 14). Each

order by the Respondent Judge expanded the claimed jurisdiction so that the Respondent Judge ultimately claimed full personal and subject matter jurisdiction over Father and the action for divorce (State Appendix 14), notwithstanding that another judge of the same court had found that there is no jurisdiction in Arizona and had declined to assert any jurisdiction over Father. (State Appendix 1 and 2)

1. The **first** jurisdictional order was entered by Judge John Ditsworth on March 4, 2005, in which he found that Arizona does not have jurisdiction over Father. (State Appendix 1). At the time of this order, Mother was in Canada and unable to enter the United States because of her visa status. (State Appendix 4) The order of Judge Ditsworth was **not** appealed.

2. Mother requested a second time of Judge Ditsworth to assert jurisdiction over Father. (State Appendix 3) Judge Ditsworth declined and entered the **second jurisdictional order** on September 2, 2005. (State Appendix 2)

3. The **third order** on jurisdiction was entered by Judge Robert Budoff of the same state court, but a different department, after Mother filed a new (second) action a few weeks after the second denial of Judge Ditsworth. This **third order** was dated February 24, 2006. (State Appendix 6) Shortly thereafter, Judge Budoff set a hearing on temporary custody and ordered that "the children shall not be removed from the State of Arizona without further order or written agreement of the parties". (State Appendix 10)

4. Since the **third order** was not clear on the issue of personal jurisdiction, Father requested an order clarifying the nature and extent of the jurisdiction claimed. Judge

Budoff issued the **fourth order** on jurisdiction on July 27, 2006, in which he found "personal jurisdiction over Father", and affirmed that the Court had "subject matter jurisdiction over the marriage and over child custody". The order also found that "Arizona has personal jurisdiction over Father to determine issues of custody, parenting time and child custody". (State Appendix 13) There was no mention in the **fourth order** of jurisdiction as to whether the court would also assume jurisdiction over property, debts, maintenance (alimony) or attorney's fees. The original complaint did not ask for alimony, but a subsequent unserved amended complaint did.

5. On September 14, 2006, Judge Budoff issued the **fifth jurisdictional order** in which he asserted jurisdiction over custody, access, child support, attorney's fees, maintenance, and all issues of the divorce. (State Appendix 15)

MEXICAN ACTION - HAGUE CONVICTION REQUEST

There was an action for custody and divorce commenced in Mexico where the children are citizens and where they resided with Father on November 3, 2004, prior to Mother filing the second divorce. The Mexico Court entered a temporary order of custody on September 14, 2005, prior to the action before Judge Budoff. (Trial Exhibit 15 found in State Appendix 22-46). The Mexican custody order was entered while the children were in their birth home in Mexico. At the time of the Mexican order, there was no order of custody from **any court** except the Mexican Court.(T, P28, L6; P60, L17)

Father requested that Judge Budoff discuss the Mexican order with the Mexican judge under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), but he declined. (State Appendix 9). On April 19, 2006, the Arizona Court received a request from the Mexican Court through the Mexican Consulate in Phoenix, accompanied with copies of the Mexican pleadings and custody order (translated with the appropriate Mexican Court seals), to return the children to Mexico under the Hague Convention. (State Appendix 18-19) Judge Budoff issued an order on April 19, 2006, acknowledging the demand and stating that he did not intend to act on nor even file the request. (State Appendix 17)

Since that time, the Mexican Department of the Exterior has made a Hague Convention demand on the United States Department of State who has in turn notified Judge Budoff of the demand and federal law on the subject. (State Appendix 47-48) The State Department is concerned about the Arizona Court's actions because of the adverse impact it will have on State Department requests on Mexico for the return of U.S. children there. (State Appendix 17)

MOTHER/CHILDREN'S TEMPORARY STATUS IN THE UNITED STATES

On March 23, 2005, during the pendency of the first divorce, Mother and the children were unable to enter the United States because she could not obtain a visa. She subsequently applied for and was granted a student visa. (State Appendix 3) Paragraph 11 of the INS form signed by Mother for herself and on behalf of the children in order to gain re-entry into the United States to attend school states: (State Appendix 20-22):

> Student Certification: I have read and agreed to comply with the terms and conditions of my admissions and those of any extensions of stay as specified in page 3. I certify that all information provided on this form refers specifically to me and is true and correct to the best of my knowledge. I certify that I seek to enter or remain in the United States **temporarily**, and **solely for the purposes of pursing a full course of** study at the school named on page 1 of this form. I also authorize the named school to release any information from my records which is needed by the INS pursuant to 8 CFR 2143(g) to determine my non-immigration status. /s/ Dena Kline 2/25/05 (Emphasis added.)

When Mother got back to Arizona after swearing she was only temporarily residing here, she again claimed to be "domiciled" in Arizona, contrary to her sworn statement to the Homeland Security, and requested Judge Ditsworth to assert jurisdiction. (State Appendix 2) When Judge Ditsworth declined, Mother filed the second divorce. Father again moved to dismiss for lack of jurisdiction and requested that Judge Ditsworth's order be honored. Judge Budoff refused to do so and set an evidentiary hearing on the issue of jurisdiction.

Judge Budoff later found that the orders of Judge Ditsworth as well as the temporary immigration status of Mother were "irrelevant" to jurisdiction. (State Appendix 6)

EVIDENTIARY HEARING

Father was not allowed to testify before Judge Budoff unless he was willing to enter Arizona and subject himself to jurisdiction. The evidence consisted of the testimony of

Mother and her friends, the testimony of a witness to the first attempted kidnaping, the testimony of a witness to the actual successful kidnaping and an expert in Mexican law. Mother confirmed that the children and the parties were Canadian citizens residing in Mexico because of Father's employment there by a Mexico company and that all were non citizens.

An expert in Mexico law testified and established that there was an effective Mexican custody order at the time of the filing of the second divorce by Mother. The children's Mexican teacher testified about the children's school attendance in Mexico and Mother's first attempt to kidnap them. The children's baby sitter testified about the forcible kidnaping of the children by Mother from their Mexican home a day before the filing of the second divorce. (this action)

Mother admitted that she served Father with the second divorce when he came to Arizona to retrieve the children after she had taken them. The sole basis for the claim of personal jurisdiction over Father was this service.(T, P1, L23) Judge Budoff suggested that if Father wanted to see his children, he should submit to the jurisdiction and ordered that the children not to be taken out of Arizona (even though Mother did so on a number of occasions) and that Father would be required to appear personally in Arizona. (State Appendix 10)

The evidence showed that the parties resided in Mexico in a 3000 square foot villa with the children for two (2) years, (T, P7, L20), that the children speak Spanish and that they attended school in Mexico. (T, P192, L9; P193, L9) It was uncontested that the children are Canadian citizens by virtue of their parents and Mexican citizens by virtue of the fact that they were born in Mexico. (T, P51, L13; P54, L3) The

children have friends in Mexico that they have known since birth. (T, P198, L3)

At some point, the parties purchased a home in Arizona, but Father continued his employment in Mexico where he still works and resides. (T, P7, L7; P12, L4; P13, L8) Father could not live in Arizona or in the United States because he did not have permission of the United States or Homeland Security to do so due to a felony conviction some years before. (T, P12, L19; P57, L8)

Father has not been able to come into Arizona, except for short visits, since February 2004. (T, P17, L3) All access by Father is limited and controlled by Homeland Security under federal law and not the courts of Arizona.

Father has only been employed in Canada and Mexico and continues to work in Mexico. (T, P54, L12) Father's employer is a Mexican corporation and he has never been employed in the United States. (T, P55, L14)

Mother also left Arizona in 2004 in violation of an Arizona Court order, returned to Canada where she resided with the her parents and the children and entered the children into school there. (T, P21, L19; P22, L21) During all other times prior to February 2005, when Mother was in the United States, she was here on a visitor's visa which required, as a matter of law, that she have no intention to remain in Arizona. (T, P46, L3-L16) Mother can also not work in Arizona nor in the United States under the terms of her visa, although she claims to have violated this prohibition. (T, P46, L17; P40, L16-23)

Judge Ditsworth had found on February 22, 2005, that Mother could not attend Court in Arizona because she was in

Canada where the children were enrolled in school and she and the children were prohibited from entering the United States. (T, P47, L23-P48, L21) Mother had been in Canada for eight (8) months prior to the ruling by Judge Ditsworth and was prohibited from entering the United States. (T, P50, L17 to P 51, L12) It is noteworthy that Mother being in Canada with the children violated a preliminary injunction issued in Arizona.

On July 29, 2005, Father returned the children to Mexico by agreement of Mother. (T, P28, L20; P30, L23; P61, L16) On September 12, 2005, Mother attempted to remove the children from Mexico, but did not succeed. (T, P194, L2) When she went to the children's school in Mexico to remove them, (T, P32, L10 to P34, L4) she was informed by the children's Mexican School Principle of the Mexican custody order giving custody of the children to Father. (T, P201 L15) Mother still attempted to kidnap the children, but was unsuccessful.(T, P192, L6; P195, L22 to P196, L23; P197, L9)

On October 6, 2005, on the same day that Mother filed her second divorce action and just a couple of weeks after Judge Ditsworth declined to assert jurisdiction, Mother was successful in her second attempt to kidnap the children. (T, P62, L19; P200, L5) She forcibly took the children from Father's home in Mexico while the children were in the care of a 15 year old baby sitter. (T, P205, L19; P209, L9) Mother wore a disguise. (T, P206, L23) The oldest child threw herself on the ground and resisted going, but Mother forcibly picked up the child and placed her into the back seat of a small car driven by someone else. (T, P207, L6) As the children were driven off, they were yelling for help. (T, P208, L2) The police responded, but it was to late. (T, P208, L5)

Ontoniel Gomez Ayala, a former Mexican Federal Judge (6 years), a law school professor (10 years), and a practicing Mexican attorney (10 years), testified as an expert on Mexican Law, that he specializes in domestic relations law, (T, P166, L15), that he is familiar with Mexican domestic relations law and procedures (T, P166 L13), that he had reviewed Father's Mexican divorce file (T, P166 L15), and that it contained an order granting custody of the children to Father (T, P169 L14) signed by the judge from the Puerto Penasco Mexican Court. (T, P169 L18)

Mr. Ayala testified that the custody order was based on evidence which legally justified the order. (T, P170 L10). Mr. Ayala did not know nor had he ever met Father. (T, P176 L17)

Father's attorney in the first divorce testified that he and Mother's attorney agreed that Father could take the children to Mexico in July 2005, and that there was no agreement or Arizona order at that time on custody. (T, P218 L17)

SUMMARY OF ARGUMENTS

A. The State of Arizona is required by the Supremacy Clause of the United States Constitution to follow federal law, but in this case have refused to do so, holding that federal law is irrelevant to state law. The Ninth Circuit Court of Appeals in *Guadin v. Remis, 415 F.3d 1028, (Ninth Circuit 2005)*, held that a state of the United States does not have subject matter jurisdiction over non United States citizens or their children when those non residents are in the United States by temporary permission only. The Arizona Court of Appeals and the Arizona Supreme Court refused to follow *Guadin*.

B. It offends traditional notions of justice and fair play as required by the Due Process Clause of the Fourteenth Amendment of the Constitution for Arizona to exercise personal jurisdiction over a non citizen when the non citizen is served with process within Arizona even though the foreign citizen is in Arizona temporarily for the purpose to retrieve his children who were kidnaped from their home in Mexico and secreted in Arizona.

C. Arizona, as a state of the United States, is required to honor and enforce the Hague Convention when the Country of Mexico requests the Court of the State of Arizona to return its citizens (children) so that the Courts of Mexico can determine their best interests. Refusal of the State of Arizona to do so violated the sovereignty of the United States and the Country of Mexico as expressed by treaty.

ARGUMENT

SUPREMACY CLAUSE

Arizona law requires that a person must be domiciled in Arizona in order for the Arizona Court to have subject matter jurisdiction to deal with issues of divorce. See A.R.S. §25-312:

> The court shall enter a decree of dissolution of marriage if it finds each of the following:
> (1) that one of the parties, at the time the action was commenced, was domiciled in this state, or was stationed in this state while a member of the armed services, and that in either case the domicile or military presence has been maintained for ninety days prior to filing the petition for dissolution of marriage.

An Arizona superior court trial judge in a domestic case only has the power and authority given him by statute and nothing more. Saxon v. Riddel, 16 Ariz. App. 325, 492 P.2d 127 (Ariz. App. 1972) The Arizona Supreme Court explained in Brandt v. Brandt, 76 Ariz. 154, 261 P.2d 978 (1953):

> "Residence" and "domicile" are not synonymous at common law, nor does the one term necessarily include the other. Saying that residence is not a jurisdictional prerequisite is not equivalent to saying that domicile is not essential to a valid decree. The court's finding in the case at bar dealt with domicile, not residence, **and without the intent to make the State of Texas his home either permanently or for an indefinite time**, Fritz T. Brandt could not acquire domicile therein. **It is well settled that no state has jurisdiction to grant a divorce unless one of the spouses is a domiciliary of the state, for without such domicile there is no sufficient nexus between the state and the marriage relationship or status to entitle that state to put an end to the marriage.** In short, there is **no jurisdiction of the subject matter of a divorce action**, and the **state itself lacking such jurisdiction, it cannot be conferred upon its courts.** By its decision in the second case of *Williams v. State of North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366,* the **Supreme Court of the United States held that a divorce decree granted without domicile of either spouse within the state is void and the decree subject to collateral attack.** This pronouncement is applicable here. For later cases in point, see *Ulrey v. Ulrey, Ind.Sup., 106 N.E.2d 793; Cohen v. Cohen, 319 Mass. 31, 64 N.E.2d 689, 163 A.L.R. 362;* and *Hobbs v. Hobbs, 91*

U.S.App.D.C. 68, 197 F.2d 412, certiorari denied *344 U.S. 855, 73 S.Ct. 93, 97 L.Ed. 664.* (Emphasis added.)

Article VI, Clause 2 of the United States Constitution, known as the Supremacy Clause provides that:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The State of Arizona is required by the Supremacy Clause to follow federal law, but in this case has refused to follow both federal law and its own law. Judge Budoff, in fact, held, and the Arizona Court of Appeals affirmed, that Mother's immigration status is irrelevant to state law. (State Appendix 6) Contrary to the Arizona Court of Appeals, the Ninth Circuit Court of Appeals in *Guadin v. Remis, 415 F.3d 1028, (Ninth Circuit 2005)*, held that a state of the United States does not have subject matter jurisdiction over non United States citizens or their children when those non residences and children are in the United States by temporary permission only:

> We are invited to decide whether two minor children, abducted by their father in Canada and brought to the United States, should be returned to Canada under the International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International and Child Abduction.....The parties disputed whether Gaudin had actually moved

> permanently to Hawaii, however, and so we remanded to the District Court for it to make that determination. The District Court found that she had indeed moved permanently, but Gaudin appealed and another panel of this court reversed, **holding that "domicile [is] the appropriate measure of whether one has moved permanently to a new jurisdiction" and that Gaudin's temporary immigration status prevented her from establishing domicile in the United States.** *Gaudin II, 379 F.3d at 637-38.* (Emphasis added.)

If federal law is supreme as seems almost too elementary to dispute, then Mother in this case could not have been domicile in Arizona. If she was not domiciled in Arizona, then the Arizona State Court was without subject matter jurisdiction under Arizona and federal law to proceed. Federal law and Mother's immigration status are **not irrelevant** to the inquiry.

It is undisputed that Mother entered the United States only after signing a written waiver pursuant to *8 USCA § 1184, 8 CFR 214(b)* that her intention was not to remain:

> (b) Every alien...shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a **nonimmigrant** status under section *101(a)(15). 8 CFR 214(b)* (Emphasis added.)

This section requires that the applicant (Mother) sign a waiver stating that he/she is a non-immigrant. Under both types of status (visitor or student), a non-immigrant does not have the intent to remain:

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) **having a residence in a foreign country which he has no intention of abandoning** and who is visiting the United States temporarily for business or temporarily for pleasure; (Emphasis added.)

and:

(F)(i) **an alien having a residence in a foreign country which he has no intention of abandoning,** who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 214(l) at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn,...(iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or

Mexico; *8 USC 1101, 8 CFR 101(B)(F)* (Definitions) (Emphasis added.)

As a matter of federal law as well as Arizona law, Mother was not and cannot be domiciled in Arizona so as to confer subject matter jurisdiction on the Arizona courts.

DUE PROCESS OF LAW

No state shall deprive **any person** of life, liberty or property without due process of law. *Amendment XIV, U.S. Constitution*. This generally means notice and opportunity to be heard in a forum where a person should reasonably expect to litigate. *Troxel v. Granville, 120 S.Ct. 2054, 530 U.S. 57, (U.S. 2000)* The Arizona long arm statute is actually contained in the Arizona Rules of Civil Procedures and is designed to acquire jurisdiction when ever the United States Constitution permits as explained in *Houghton v. Piper Aircraft Corp., 112 Ariz. 365, 542 P.2d 24 (1975)*:

> Arizona's long arm statute is contained in Rule 4(e)(2) of the Arizona Rules of Civil Procedure and is intended to give Arizona residents the maximum privileges permitted by the Constitution of the United States. See *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Rule 4(e)(2) states:
>
> "Summons; personal service out of state. When the defendant is a *resident* of this state, or is a corporation *doing business* in this state, or is a person, partnership, corporation or unincorporated association

> subject to suit in a common name which has *caused an event* tc occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state." (Emphasis added.)

In *Rutherford v. Rutherford, 193 Ariz. 173 (Ariz. App. 1998)*, Arizona decided that service of process within Arizona satisfies due process and permits jurisdiction over a non citizen regardless of minimum contacts. In this case, however, the litigants are non United States citizens who cannot enter the United States except on occasion and by special permission.

The Arizona Supreme Court in *Auman v. Auman, 134 Ariz. 40, 42, 653 P.2d 688, 690 (1982)* held that without personal jurisdiction **over both parties** to a divorce, a trial court **does not have** authority to determine any question concerning property rights, custody, support, etc. The same Court held in *Uberti & C. v. Leonardo, 181 Ariz. 565, 892 P.2d 1354, (Ariz. 1995)* that before an Arizona Court can exercise general jurisdiction over a party, the court must find that the party "**purposefully availed**" himself of the protection of the laws of the State as recited by this Court in *Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)*. The Arizona Supreme Court agreed in *Uberti* that:

> .....the jurisdictional issue thus hinges on federal law. Under the federal constitution, two factors govern the scope of due process for in personam jurisdiction: (1) the defendant's "minimum contacts" with the forum state and (2) the reasonableness of exercising jurisdiction over the foreign defendant. *Asahi Metal*

Indus. v. Superior Court, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)

A father from another country does not "purposefully avail" himself of the laws of Arizona when he comes from his country of residence to retrieve his children kidnaped therefrom and secreted in the United States. The only contact that Mother relied on for jurisdiction was Father's presence in Arizona to retrieve his children. *Uberti* was clear that:

> The "substantial connection," between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the* forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposely directed toward the forum State. *Id.* at 112, 107 S. Ct. at 1032 (Emphasis in the original)

Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945) held that a court cannot assert jurisdiction if to do so would offend traditional notions of fair play and substantial justice. The Arizona Court of Appeals relied on its prior decision in *Rutherford v. Rutherford, supra.*, for the proposition that the sole act of service of process within the state is sufficient to confer personal jurisdiction. *Rutherford* relied on this Court's decision in *Burnham v. Superior Court, 495 U.S. 604, 109 L. Ed. 2d 631, 110 S. Ct. 2105 (1990)*, where this Court said (495 U.S. at 610):

> Among the most firmly established principles of personal jurisdiction in American tradition is that the

> courts of a State have jurisdiction over nonresidents who are physically present in the State.

As a result, the Arizona Court of Appeals held that Father, as a "non-resident" only had to be served in Arizona to confer jurisdiction and that minimum contacts were no longer needed. The Arizona Court of Appeals, however, ignored the fact that Father is not only a non-resident of Arizona, but is also a non citizen. Residents of the various states are allowed to freely move between states, however, non citizens are not.

For those who are allowed this free intercourse between the states, it is difficult to understand the lack of free intercourse between the United States and other countries experienced by non citizens; especially since the events of September 11, 2001. The inability of Father to enter the United States at will was what Justice Farris addressed in *Ziegler v. Indian River County, 64 F.3d 470 (9th Cir 1995)*:

> ...even if the first two prongs are satisfied, an unreasonable exercise of jurisdiction violates the Due Process Clause. In evaluating reasonableness, we examine:
>
> (1) the extent of the defendant's purposeful injection into the forum;
>
> (2) the defendant's burdens from litigating in the forum;
>
> (3) the extent of conflict with the sovereignty of the defendant's state; [or foreign country]

(4) the forum state's interest in adjudicating the dispute; [there is none other than Mother likes Arizona's laws.]

(5) the most efficient judicial resolution of the controversy;

(6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and

(7) the existence of an alternative forum. [there was a pending action in Mexico when Mother brought this action.]

All seven (7) factors must be weighed. None is dispositive. Father traveled to Arizona to see his children after they were forcibly removed from the home of their birth by Mother. It is burdensome for Father to litigate in Arizona because of his limited ability to travel here which is controlled by Homeland Security. Assumption of jurisdiction ignores the "sovereignty" of Mexico and Canada where these parties are domiciled and reside.

Because Arizona is a transit state, it is common that parties to litigation from other states are allowed to testify by telephone. In this case, the Mexican law expert testified by telephone as did the baby sitter who witnessed the kidnaping and the children's school teachers, but the state court refused to allow Father to do so when *Rule 8(B) of the Arizona Rules of Family Law Procedures* makes this procedure common:

> Upon request of a party or witness, or on its own motion, and upon finding that no substantial prejudice will result to any party by allowing telephonic or video conference testimony, the court may allow a

> party or witness to give testimony at any evidentiary hearing or trial, telephonically or by video conference, if the court finds, as to a party, that a party is reasonably prevented from attending the hearing or trial and the court finds, as to a witness, that the witness is either, a) reasonably prevented from attending the hearing or trial; b) would be unduly inconvenienced by attending the hearing or trial; or c) attendance in person at hearing or trial would be a burdensome expense to either the witness or a party.

If due process is the goal of the Fourteenth Amendment of the United States Constitution and the Hague Convention Treaty, then the actual physical attendance of Father would have been expensive, burdensome and would have subjected Father to vexatious lawsuits by Mother. Appearance by telephone would have cured these problems and provided the state court with valuable information about the children and their best interests.

Father was denied due process because the state court refused to allow Father to testify when the court allowed many others to do so. This meant that Father could not rebut anything that Mother said and had to rely solely on the skill of his lawyers to get the truth from Mother. State *Rule 8(B)* is designed to insure due process, but it was ignored:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *Amendment XIV*

The Fourteenth Amendment applies to "any person", so that the state court must provide Father with due process. When the state court told Father that he could not testify by telephone as it allowed others to do, then Father wasdenied due process and may be even equal protection since he was similarly situation to the other Mexican witnesses that the state court did allow to testify by telephone.

HAGUE CONVENTION DEMAND

Arizona, as a state of the United States, is required to honor and enforce the Hague Convention when the Country of Mexico requests the Court of the State of Arizona to return its citizens (children) so that the Courts of Mexico can determine their best interests. Refusal of the State of Arizona to do so violated the sovereignty of the United States and the Country of Mexico. Indeed, the Arizona state court refused to even discuss these issues with the Mexican court.

After the filing of the petition for review with the Arizona Supreme Court, Father filed an action in federal court seeking an adjudication of the habitual place of abode of the children under the *Hague Convention on the Civil Aspects of International Child Abduction* ("the Hague Convention"), Oct. 25, 1980, 19 I.L.M. 1501, as implemented by the *International Child Abduction Remedies Act* ("ICARA"), *42 U.S.C. § § 11601-11610.*

The district Court dismissed the action based on the belief that Hague Convention issues had been litigated in the state court. They were not. It is undisputed that the state court refused to even address the Hague Convention demand. The denial of the district court is presently before the Ninth Circuit Court of Appeals. Number 07-15500

In *Shalit v. Coppe, 182 F.3d 1124 (Ninth Circuit 1998)*, the Court explained the purposes of the Hague Convention:

> The Hague Convention, adopted in 1980, addressed the increasing problem of international child abduction in the context of international law while respecting rights of custody and visitation under national law. According to the Preamble, the Convention aims "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence . . . ." Hague Convention, Preamble, T.I.A.S. No. 11,670 at 4. The twin objectives of the Hague Convention are (1) "to secure the prompt return of children wrongfully removed or retained," and (2) "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Id., art. 1; see also *In re Prevot, 59 F.3d 556, 558 (6th Cir. 1995)*.2 One of the paramount purposes of the Hague Convention is to "restore the status quo and deter parents from crossing international borders in search of a more sympathetic court." See *Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 376 (8th Cir. 1995)*.

At the present time, one (1) of the minor children is scheduled for or has already had back surgery, but because of the actions of the state court, Father has been excluded from receipt of any information about his child in violation of the promptness goal of the Hague Convention. Arizona has also enacted provisions to deal with the requirements of the Hague Convention which are found in Arizona's version of the *Uniform Child Custody Jurisdiction and Enforcement Act. (UCCJEA)*

Arizona treats countries such as Mexico who have signed the Hague Convention as it treats other states of the United States for the purposes of demands and custody cases under Hague. *A.R.S.* §*25-1005* provides:

> A. A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying this article and article 2 of this chapter.
>
> B. Except as otherwise provided in subsection C, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under article 3 of this chapter.
>
> C. A court of this state is not required to apply this chapter if the child custody law of a foreign country violates fundamental principles of human rights. See

A.R.S. §*25-1053*, also required that Judge Budoff enforce the Mexican custody order and communicate with the Mexican Court about its orders before assuming any kind of jurisdiction; Judge Budoff simply refused to obey the statute and the Arizona Court of Appeals affirmed his actions:

> A. A court of this state **shall recognize and enforce** a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter and the determination has not been modified in accordance with this chapter.

> B. A court of this state may use any remedy available under any other law of this state to enforce a child custody determination made by a court of another state. The remedies provided in this article are cumulative and do not affect the availability of other remedies to enforce a child custody determination.

Without speaking with the Mexican Court, Judge Budoff could not make determinations about the matters considered by the Mexican Court before entering its custody order even though Judge Budoff had an expert and former Mexican Supreme Court judge testify that the Mexican custody order existed, was valid under Mexican law and was based on legally sufficient evidence. At the very least, Judge Budoff was required to contact and discuss the matter with the Mexican Court under *A.R.S.* §*25-1036*:

> A. Except as otherwise provided in section *25-1034*, a court of this state shall not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state [foreign country] having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state [foreign country] because a court of this state is a more convenient forum under section 25-1037.
>
> B. Except as otherwise provided in section *25-1034*, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to section 25-1039. If the court determines that a child custody proceeding has been commenced in a court in

> another state [foreign country] that has jurisdiction substantially in accordance with this chapter, the court of **this state shall stay its proceeding and communicate with the court of the other state.** If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state **shall dismiss the proceeding.** (Emphasis added.)

Judge Budoff certainly had adequate evidence that there was a pending action in Mexico, that the Mexican Court had entered an order on custody and that he had a duty to communicate with the Mexican Court. The duties of a state court judge under the UCCJEA are not permissive nor discretionary, but mandatory. *A.R.S.* §*25-1040* is designed to allow Father to be heard on the issue of jurisdiction, but Judge Budoff refused to allow Father to do so unless he personally appeared before the court and subjected himself to service of process by Mother in other lawsuits in Arizona.

CONCLUSION

Mother is not domiciled in Arizona nor is Father. Under Arizona statutory law and the decisions of the federal Courts, Mother, as a matter of law, is only in Arizona temporarily and, as such, cannot be domiciled in Arizona so as to confer subject matter jurisdiction on the Arizona State Courts.

To assert personal jurisdiction in Arizona over Father violates "traditional notions of fair play and substantial justice" because his ability to enter the United States is limited. He is not free to move from state to state as are non resident citizens of the United States. Service of process within Arizona when a Father comes to retrieve his kidnaped

children does not establish the minimum contacts required by the Constitution to establish purposeful availment under federal law.

Judge Budoff of the state court should not have attempted to assume jurisdiction under the UCCJEA (Hague Convention) until he discussed the case with the Mexican Court. The state Court should have given full faith and credit to the custody orders of the Country of Mexico under the Hague Convention and state law and failure to do so violated the intentions of Congress in ratifying the Hague Convention Treaty and enacting laws to enforce it.

The state court received a valid demand under the Hague Convention for return of the children to Mexico. A state trial court should not ignore such a demand, but is required to act on the demand by Arizona and federal law. At the very least, the state court should have contacted the Mexican Court to determine which Court should assume jurisdiction.

Judge Budoff should have also given res judicata effect to the orders of Judge Ditsworth on jurisdiction.

Dated this 12th day of July, 2007.

Respectfully Submitted,

C. ROBERT COLLINS
Counsel of Record
10801 North 32nd Street, Suite 3
Phoenix, Arizona, 85028
(602) 788-7227 - Voice
(602) 569-6091 - Fax
Arizona Bar Number 015405
Attorney for Petitioner/Father

APPENDIX

APPENDIX A

Supreme Court
STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231
TELEPHONE: (602) 452-3396

RACHELLE M. RESNICK
Clerk of the Court

Kathleen E. Kempley
Chief Deputy Clerk

April 18, 2007

RE: MICHAEL KLINE v HON. ROBERT BUDOFF / DENA KLINE
Arizona Supreme Court No. CV-06-0380-PR
Court of Appeals Division One No. 1 CA-SA06-0175
Maricopa County Superior Court FC2005-010654

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 17, 2007.

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 18th day of April, 2007.

Rachelle M Resnick, Clerk

TO: C Robert Collins, Collins & Collins LLP
Wm James Fisher Jr, Wm James Fisher PA
Hon Robert A Budoff, Judge, Maricopa County Superior Court
Philip G Urry, Clerk, Court of Appeals, Division One, Phoenix

APPENDIX B

Division 1
Court of Appeals
State of Arizona

No. 1 CA-SA 06-0175

[Filed October 03 2006]

PHILIP G. URRY, CLERK
By M. Levar

MICHAEL KLINE,

Petitioner,

v.

THE HONORABLE ROBERT BUDOFF, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge,

DENA R. KLINE,

Real Party in Interest.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE DEPARTMENT D
MARICOPA County Superior Court
No. FC2005-010654

DECISION ORDER

¶1 This special action came on regularly for conference (Presiding Judge Sheldon H. Wesiberg with Judges Patricia A. Orozco and Philip Hall Participating) on September 27, 2006. For the reason explained below, we accept jurisdiction and deny relief.

¶2 The acceptance of jurisdiction in a special action is discretionary. *Demarce v. Willrich,* 203 Ariz. 50, 504, ¶ 5, 56 P.3d 76, 78 (App. 2002). Because of the nature of a custody proceeding is such that a delay results in a detriment to the child, the ultimate remedy of appeal is "neither plain, speedy nor adequate." *Silver v. Rose,* 135 Ariz. 339, 343, 661 P. 2d 189, 193 (App. 1982). Moreover, this is petitioner's third special action raising issues nearly identical to those previously filed. Therefore, we accept jurisdiction.

¶3 Petitioner asserts that the Honorable Robert Budoff abused his discretion by: (1) exercising personal jurisdiction over him; (2) Exercising subject matter jurisdiction over the proceedings; (3) revisiting the jurisdiction issue following the Honorable John Ditsworth's order dismissing the proceedings for lack of jurisdiction; (4) failing to defer to or communicate with the Mexican court; and (5) scheduling a hearing on temporary financial orders.

¶4 First, petitioner contends that Judge Budoff abused his discretion by exercising personal jurisdiction over him

because he has not "purposefully avail [ed] himself of the protection of [Arizona's] court" and has not had the requisite "minimum contacts" with Arizona to allow the State's courts to "reasonable" exercise jurisdiction over him. Arizona may assert personal jurisdiction over a nonresident who is physically present and served within the state. *Rutherford v. Rutherford,* 193 Ariz. 173, 174, ¶7, 971 P.2d 220, 221 (App. 1998). On October 6, 2005, petitioner was personally served by a process server in Scottsdale, Arizona. Thus, the physical presence requirement for the establishment of jurisdiction was satisfied, rendering a minimum contacts analysis unnecessary.

¶5 Petitioner nonetheless argues that he traveled to Arizona only to visit his "kidnaped" children, thereby negating the otherwise valid personal service. As noted in *Rutherford,* 193 Ariz. at 174, ¶9, 971 P.2d at 221, "[t] here is some authority for the proposition that courts will not assert jurisdiction over people who have been tricked into entering a jurisdiction so they could be served with process." However, Judge Budoff specifically found that the "record does not indicate tat [petitioner] was present in the state of Arizona as a result of trickery or fraud, which in some jurisdiction would void a court's jurisdiction." Moreover, Petitioner's factual position on this issue has been inconsistent. For example, in his motion before the trial court he explained that he was served "while in phoenix while in Arizona is sufficient to confer personal jurisdiction to the State.

¶6 Second, petitioner argues that Judge Budoff abused his diescretion by exercising subject matter jurisdcition over these proceedings because neither he nor Mother is domiciled in the State. Because Mother is in the United states on a student visa, which required that she aver she was not abandoning her

residence in Canada, petitioner contends that Mother "as a matter of law, [] cannot establish a domicile in Arizona."

¶7 Under Arizona law, a trial court has subject matter jurisdcition over an action for dissolution when one or both of the spouses is domiciled in the State for at least ninety days before filing a petition for dissolution of marriage. Ariz. Rev. Stat. § 25-312 (1) (2000) ; *Auman v. Auman,* 134 Ariz. 40, 42, 653 P.2d 688, 690 (1982). "Domicile is primarily a state of mind," an intent to remain in the state, "combined with actual physical presence in the state." *St. Joseph's Hosp. and Med. Ctr. v. Maricopa County,* 142 Ariz. 97, 99, 668 P2d 986, 991 (1984); *Clark v. Clark,* 124 Ariz. 235, 237, 603 P2d 506,508 (1979).

¶8 Although there is not unanimity among the states, the majority rule is that "nonimmigrating aliens may form the requisite intent to establish a permanent residence necessary for divorce jurisdiction." *Bustamante v. Bustamante,* 645 P2d 40, 42 (Utah 1982) (citing cases). Mother testified that her student visa is valid for "at least a five-year period" and that she would have the opportunity to renew her student visa before its expiration. After hearing Mother's testimony, the trial court specifically found that she "intends to remain here" after her current visa expires and therefore "Mother's visa status is irrelevant." We agree with the trial court and the majority of cases that hold that a spouse's visa status is not controlling when determining domicile. Based upon Mother's residency in Arizona more than ninety days before the petition was filed and her intent to remain here, the trial court properly exercised subject matter jurisdiction over these proceedings.

¶9 Third, petitioner claims that Judge Ditsworth's order dismissing Mother's petition for lack of jurisdiction is the

final determination on jurisdiction, precluding any subsequent court from revisiting the issue. However, this assertion is not supported by Judge Ditsworth's September 2, 2005 minute entry stating that the order of dismissal was "without prejudice" and advising the parties that they could "re-file under a new case number." See in re Gen. Adjudication of All Rights to use Water in Gila River Sys. And Source, 212 Ariz. 64, 74, ¶ 32, 127 P.3d 882, 892 (2006) (noting a dismissal without prejudice is not and adjudication on the merits and therefore does not have res judicata effect). Furthermore, as noted by Judge Budoff, "[t] he fact that Judge Ditsworth dismissed a prior proceeding is ... irrelevant as Mother may not have been domiciled in Arizona at the time she filed her prior Petition for Dissolution." Therefore, petitioner's contention that Judge Budoff's exercise of jurisdiction is precluded by the doctrine of res judicata is without merit.

¶10 Fourth, petitioner contends that Judge Budoff abused his discretion by exercising jurisdiction over the custody matter rather than deferring to the Mexican court that previously issued a custody order, as required pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), A.R.S. § 25-1001 to -1067 (Supp. 2005). At a minimum, petitioner argues that the trial court's failure to at least contact the Mexican court violated the UCCJEA.

¶11 The UCCJEA governs the exercise of jurisdiction in child custody proceedings. In an initial child custody determination, the UCCJEA limits a court's exercise of jurisdiction to four jurisdictional bases, including "the home state of the child on the date of the commencement of the proceeding[.]" § 25-1031 (A) (1). As defined in § 25-1002 (7) (a) (1), "home state" means "[t] he state in which a child lived with a parent or a person acting as a parent for at least

six consecutive months immediately before the commencement of a child custody proceeding, including any period during which that person is temporarily absent from that state."

¶12 Pursuant to § 25-1005, the UCCJEA applies to foreign countries as though they were a "state" of the United States and a "child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter mus be recognized and enforced." Relying on this statute, petitioner claims that Mexico, not Arizona, has jurisdiction over these custody proceedings.

¶13 Mother filed her second petition for dissolution on October 6, 2005. The children resided continuously in Arizona from February 2005 until July 29, 2005, when they were taken to Mexico by petitioner and remained there without Mother's permission. Accordingly, during the six months immediately before the commencement of the proceeding, from April 6, 2005 to October 6, 2005, the children lived in Arizona for a week shy of four months and in Mexico for a little over two months. As noted by the trial court, the children did not live in Mexico for a sufficient period of time to authorize Mexico "to exercise jurisdiction over the children in conformity with [the UCCJEA]," and the trial court therefore had no duty to enforce the Mexican court order or otherwise confer with the Mexican court. See § 25-1053 (A). Moreover, the trial court's implicit finding that the period of time the children lived in Mexico qualifies as a mere "temporary absence" from Arizona is a reasonable interpretation of the evidence and therefore its exercise of

jurisdiction over the custody proceedings did not constitute an abuse of discretion.[1]

¶14 Fifth, petitioner contends that Judge Budoff abused his discretion by "proceed [ing] without jurisdiction or legal authority" and holding an evidentiary hearing on temporary orders after the "Mexican Department of the Exterior has requested the return of the children to Mexico under the Hague Convention .... [and] [t] he [United States] Department of State has requested the Respondent Judge for a stay under Article 16 of the Hague Convention."

¶15 In her August 22, 2006 letter to Judge Budoff, Ellen Conway, Director of the Office of Children's issues for the United States Department of State, informed the trial court that an application had been filed for the return of the children to Mexico and, quoting Article 16 of the Hague Convention, advised that the trial court should not "decide on the merits of rights of custody until it has been determined that the child [ren] [are] not to be returned under this Convention, or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice." The letter further stated that it is petitioner's "responsibility... to initiate return proceedings in an appropriate state or federal court... within a reasonable time."

¶16 Although petitioner claims that Judge Budoff "has received valid demand under the Hague Convention for return of the children to Mexico, " he has not invoked the Hague Convention in the trial court. Based on our review of the

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[1] At the time the trial court exercised jurisdiction pursuant to the UCCJEA, it had not yet received notice from the United States Department of State regarding the Hague Convention.

record submitted, the only reference to the Hague Convention before the trial court is in the Department of State letter and, as stated in the letter, it is petitioner's responsibility to initiate proceedings. *See* Hague Convention on the Civil Aspects of International Child Abduction Article 16. Indeed, petitioner has acknowledged that he is required to take further action to invoke the remedy under the Hague Convention. *See* Hague Convention on the Civil Aspects of International Child Abduction Article 16. Indeed, petitioner has acknowledged that he is required to take further action to invoke the remedy under the Hague Convention. See Petitioner's Letter to Opposing Counsel Dated August 25, 2006 ("We have been requested by the State Department's agent to file an action under the Hague Convention in the federal court and will probably do so[.]"); Petitioner's Letter to opposing Counsel Dated August 28, 2006 ("The United States Department of State would like to see us file a federal action under the Hague Convention.... would you like us to do so?").

¶17 Furthermore, even if petitioner had proceeded properly under the Hague Convention, the trial court has not contravened the Hague Convention. The language of the Hague Convention prohibiting a custody decision on the merits simply prevents Judge Budoff from entering a final custody order until either: (1) a determination is made whether the children need to be returned to Mexico pursuant to the Convention, following petitioner's yet-to-be-filed petition for return of the children in state or federal court, or (2) a reasonable time elapses and petitioner fails to file such a petition. Thus, the evidentiary hearing before Judge Budoff

to establish temporary financial orders would not have violated the Hague Convention.[2]

¶18 Finally, both parties request an award of attorneys' fees. Petitioner has not prevailed on any issue and his request is denied. Mother requests an award of attorneys' fees pursuant to A.R.S §§ 25-324 (2000), 12-349, -341.01(C), -2106 (2003), and Arizona Rules of Civil Appellate Procedure (Rule) 25. Section 25-324 provides for an award of attorneys' fees based on the relative financial resources of the parties and the reasonableness of their positions. In its September 14, 2006 minute entry, the trial court attributed to petitioner a monthly income of $10,000 per month and to Mother a minimum wage of $890 per month. Based on the parties' relative financial situations, we award Mother her reasonable attorneys' fees. Moreover, A.R.S. §12-2106 and Rule 25 provide for sanctions when an appeal is frivolous. A claim is frivolous if it is not supportable by any reasonable legal theory. *See* Matter of *Levine,* 174 Ariz. 146, 153, 847 P.2d 1093. 1100 (1993). Here four of petitioners's five issues raised in this special action are not supportable by any reasonable legal theory: personal jurisdiction, res judicata, UCCJEA, and Hague Convention. Moreover, although petitioner's claim regarding subject matter jurisdiction is not inherently frivolous, this is his third special action raising this issue, with the two previous panels declining jurisdiction. Therefore, we award Mother her reasonable attorneys' fees

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[2] The subsequent evidentiary hearing was held on September 14, 2006.

incurred in this special action following her compliance with the Arizona Rule of Civil Appellate Procedure 21 (a).[3]

¶19 **IT IS ORDERED** accepting jurisdiction of the special action and denying relief.

/s/_____
PHILIP HALL, Judge

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[3] Based on our decision to award Mother attorneys' fees pursuant to §§ 25-324, 12-2106, and Rule 25, we need not address the bases Mother cites.